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## "A CONTEMPORARY STATE TRIAL—THE UNITED STATES *VERSUS* JACOB ABRAMS *ET ALS*."

**A**N article with the above title, written by Professor Zechariah Chafee, Jr., was published in April, 1920 (33 HARVARD LAW REVIEW 747). Thereafter two charges were made: (1) that the writer of this article misstated facts which he could not have misstated, honestly, if he had, in fact, taken the pains to consider the case as a whole; (2) that Dean Pound, Professors Frankfurter, Chafee, and Sayre, and Mr. Adams, the Librarian, had signed a petition for executive clemency in the case of Abrams which contained misleading statements of fact. The matter was referred by the Board of Overseers to the Committee to Visit the Law School. That Committee reported as follows:

In the matter of the statement of Austen G. Fox, Esq., with respect to an article by Professor Zechariah Chafee, Jr., in the Harvard Law Review of April, 1920, entitled "A Contemporary State Trial."

### REPORT OF THE COMMITTEE TO VISIT THE LAW SCHOOL

To the Board of Overseers of Harvard College:

At a meeting of the Board of Overseers, held on the 9th day of May, 1921, a statement signed by Austen G. Fox, Esq., and an accompanying letter signed by certain graduates of the Harvard Law School with respect to an article by Professor Zechariah Chafee, Jr., in the April, 1920, number of the Harvard Law Review, and with respect to a petition for pardon signed by Dean Pound, Professors Frankfurter, Chafee and Sayre, and Mr. Adams, the Librarian of the Law School, were referred to this committee to consider and report its conclusions to the Board of Overseers.

This committee had a hearing on the issues raised by this statement, at the Harvard Club of Boston, on the 22nd day of May, 1921, at which were present the President of the University, Mr. Fox and several of the gentlemen who signed the letter of transmittal, Dean Pound, Professors Chafee, Frankfurter and Sayre, Librarian Adams and others.

The committee has carefully considered the issues involved and begs to report as follows:

1. The charge of impropriety in signing a petition for the pardon of Jacob Abrams was not sustained and was abandoned.
2. The committee are unanimously of the opinion that Professor Chafee made no statements in his article which were consciously erroneous.

A majority of the committee are of the opinion that he made no statements in his article that were culpably negligent and so far as any material statements of law or fact may have been erroneous, the errors, if any, were in matters of opinion only.

A minority of the committee are of the opinion that the article contains erroneous statements of fact which should not have been made, and having been made, should have been corrected in the Harvard Law Review.

The committee therefore recommend that no further action be taken by the Board of Overseers.

Respectfully submitted,

For the Committee.

(Signed) FRANCIS J. SWAYZE,  
*Chairman.*

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Professor Chafee desires to make the following corrections and statements with respect to the article.

(1) The article stated (page 755) that it was the duty of the court to warn them (the jury) explicitly against the Russian theory of guilt, and confine their attention to the Pro-German theory, and that "there is no trace of such a warning in the record." For this second statement should be substituted: "The judge failed to give any adequate warning against this theory of guilt,—the jury certainly may have, and probably did, misunderstand the issue."

(2) Prober, one of the defendants, admitted that he was opposed to intervention in Russia. He was not shown to have had anything to do with the pamphlets. The article stated (page 761) that "the acquittal of the other prisoner, Prober, was directed by the

court." For this statement should be substituted: "The jury acquitted Prober."

(3) The article stated (page 750) that this was Judge Clayton's "first Espionage Act case." The author relied on the Bulletins of the Department of Justice on the Interpretation of War Statutes, which contained no previous trial before Judge Clayton. The fact, however, is that Judge Clayton had tried previously two or three Espionage Act cases, which, so far as the author knows, have never been reported.

(4) Strike out the statement on page 774 that "The wife of one prisoner has been deported to Russia without even a chance for farewell."

(5) The article stated (page 750) that all the prisoners except one who died before trial were indicted. The fact is that this prisoner was indicted at the same time as the other prisoners, that his indictment was severed on motion of the prosecution, and that he died before completion of the trial.

(6) For the last paragraph on page 761 of the article, substitute the following. New matter is bracketed.

"Two features of the trial demand a passing notice. The method by which confessions were obtained from the defendants after arrest was not raised on appeal, since the overt acts were proved in other ways, but their testimony [if it can be believed] throws a significant light on the question, important to criminologists, of the treatment which political prisoners may expect in this country, especially if they be obscure aliens. [The deportation raids prove that abuses are possible, but such a conclusion cannot be reached in the Abrams case without a detailed investigation of the conflicting evidence.] The army sergeants deny threats and force. [The assistant district attorney, who showed much consideration toward the prisoners, noticed no traces of violence on the morning after the arrest, and is convinced that none was used.] [On the other hand,] ('but' in the original) the charges of brutality seem] ('are' in the original) disquietingly specific and sincere. The defendants and their counsel also insisted [though the influenza epidemic and the long interval since the arrest render it improbable,] ('but not so convincingly' in the original) that Schwartz's fatal illness [was caused by] ('resulted from' in the original) the violence of one soldier, whom Judge Clayton relieved from the necessity

of telling whether or not he was called by his associates, 'The Tiger.' The court observed, 'There is no evidence as to who killed Schwartz any more than there was any evidence as to who killed cock robin.'"

In the second line of page 749, substitute "captured" for "entrapped." In fourth line from the bottom of page 773, substitute "young aliens" for "youngsters."

(7) The article stated (page 774) that "The whole proceeding, from start to finish, has been a disgrace to our law." The author remains of the opinion that (a) the conduct of the trial by Judge Clayton was very unfair to the prisoners, and (b) that the sentences recommended by the prosecuting officers and imposed by the court (details below) were much too severe. But the author did not intend to charge, and does not charge, that the prosecuting officers tried the case in an unfair manner.

(The court asked John M. Ryan, Assistant United States Attorney, for a suggestion as to sentences. He recommended leniency in the case of Rosansky, and maximum prison sentences for the other defendants. The sentences imposed were: Abrams, Lipman, and Lachowsky, twenty years in the penitentiary, with a fine of \$1000 each; Mollie Steimer, fifteen years with a fine of \$500; Rosansky, three years with a fine of \$1000.)

(8) The soundness of the author's conclusions (page 773) that "the trial judge ignored the fundamental issues of fact" and "allowed the jury to convict them for their Russian sympathies and their anarchistic views" should be tested by an examination of the whole record, including the stenographer's minutes, and these minutes should be added to the list of principal sources (footnote, page 747). These minutes are in the office of the United States Attorney in New York City. Criticism of the soundness of the author's conclusions is mainly based upon certain passages in the stenographic minutes. The author remains of the opinion that the judge during the trial, by bringing out the fact that the defendants were anarchists and by examining them as to their anarchistic views, had created a prejudice against them which was not cured by his charge, and that taking the proceedings as a whole the jury certainly may have thought, and probably did think, that an intent to prevent intervention in Russia was a criminal intent under the indictments; but the author wishes to give in full the passages

from the stenographer's minutes upon which his critics mainly rely.

Toward the close of the main charge, the court said:

"If you find that the defendants purposely and intentionally wrote, uttered, printed and published what they are charged to have written, uttered, printed and published, in a wilful attempt to bring the form of the government of the United States into contempt, scorn, contumely and disrepute, or to encourage resistance to the United States, or to urge and advocate the curtailment of the production of ordnance and ammunition necessary and essential to the prosecution of the war, with intent by such curtailment to cripple and hinder the United States in the prosecution of the war, this would constitute criminal intention, notwithstanding you may also find that the motives of the defendants were to serve a certain faction in Russia in so doing, and the defendants were not conscious of doing anything unlawful, because they did not know the law." (pp. 237, 238, printed RECORD; p. 777, Sten. Min.)

The court charged at request of defendants' counsel:

"No. 19.—The law does not punish earnest attempts to spread beliefs or ideas which may be entertained by an individual whatever may be his political creed or economic beliefs, unless by so doing he intends to commit a crime and violate some provision of our criminal law." (pp. 797-8, Sten. Min.)

The first of the requests to charge presented by defendants' counsel was charged in the following words:

"No. 1. I do not have to remind you that every man has the right to have such economic, philosophic or religious opinions as seem to him best, whether they be socialistic, anarchistic or atheistic, and you should divorce yourselves from any prejudice you may have against any defendant by reason of proof of any such opinions on his part. (p. 780, Sten. Min.)

The defendants' counsel requested the following instruction. (p. 808, Sten. Min.):

"That if from the fact that an army had been sent to Russia without a declaration of war, the jury should become of the belief that the defendants merely intended to protest against that intervention, they must find the defendants not guilty."

The court said:

"I permitted you to read that to the jury, and I will say this to the

jury, that whatever may have been done by an army of intervention is not in this case, and I leave it to you . . . to say what the intention of the defendants was in the printing and distributing of the pamphlets. . . . Did they intend to do those things that the indictment says they did? That is for you."

Immediately following this request appears the following in the stenographer's minutes:

"Mr. Weinberger: That if the jury should find that the defendants' intentions were only to protest against intervention in Russia, they must find them not guilty.

"The Court: I have told you over and over again, and I do not think it is serving a good purpose to repeat it —

"Mr. Weinberger: I just wanted to make it clear.

"The Court: I endeavored to make it clear, and I have left it to the jury and told them to take into consideration all the facts and circumstances."

*Zechariah Chafee, Jr.*